SUPREME COURT OF FLORIDA

Monday, April 5, 1982

LINDA L. McGOUGH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 61, 535

District Court of Appeal,

5th District - No. 80-561

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

by: /s/ Tanya Carroll
Deputy Clerk

TC

cc: Hon. Frank J. Habershaw, Clerk
Hon. Richard B. Keating, Judge
Hon. W. D. Gorman, Clerk
Warren H. Edwards, Esquire
Mark C. Menser, Esquire

[3] * * * requested by the jury.

MR. BAND: Judge, I have no desire to see them go back. It makes no difference.

THE COURT: Under the law, they are required to be reduced to writing, which they are or will be, but it's discretionary with the court as to whether they accompany the jury back to the jury room, and I think we will not send them back.

MR. KIRKLAND: There was one request, if Your Honor please, that was made for the record and was denied. We would request the Court, in view of the nature of this charge, that the Court read to the jury the punishment as it relates to each of the offenses included as lesser included offenses of the indictment.

MR. BAND: The State would oppose that motion, Your Honor.

THE COURT: I will not do that.

MR. KIRKLAND: All right.

THE COURT: I think we are agreed on the lesser included offenses, but, for the record, let me, gentlemen, review that.

The charge, of course, contained in the indictment is murder in the first degree and we are agreed, I believe, that the lesser included offenses would be murder in the second degree, manslaughter, aggravated [4] assault, assault, and battery.

MR. KIRKLAND: Yes, sir.

MR. BAND: That's correct, Your Honor.

THE COURT: Any other matter?

MR. KIRKLAND: Did you rule on my motion for a judgment of acquittal? I know you previously ruled, but I didn't know.

THE COURT: I'll deny the motion.

MR. KIRKLAND: All right.

THE COURT: Any other matter that we need to—

MR. BAND: I don't believe so, Your Honor.

THE COURT: All right. The verdict form is as we have reviewed it, as being typed up, and you will get an opportunity to see or to have an opportunity to before we finish.

Do you have any idea how long you will need, Mr. Band?

MR. BAND: No, Your Honor. I don't anticipate being all that verbose.

MR. KIRKLAND: No souls are saved after the first twenty minutes, Your Honor.

THE COURT: We will remember that pledge, Mr. Band.

Would you bring the jury in, please.

(Whereupon, the jury entered the courtroom at 2:59 o'clock P.M., after which the following proceedings occurred:) • • •

• • •

[10] Number two, he was living in the victim's, excuse me, living in the defendant's house. Now, what is the most important thing for someone, for an individual like Mr. McCraney? He is a street person. He needs a place to sleep. He needs the security of a home. That's the only thing he has because he has no money. He lives from meal to meal, but he needs a place to go, and Mrs. McGough supplied him with that place to go and he was willing to protect himself by lying to the police.

But he came down to my office and I advised him of perjury. I advise all witnesses. I advised them that, if they do not tell the truth and I can prove they do not tell the truth, I will prosecute them for perjury, whether they did it in my office under oath or on the stand. If I ever catch a witness, I will prosecute them for perjury if I can prove it.

And Mr. McCraney said he fabricated a story, but that he came into court and he told the truth. There was never ever any knife, that he then took an automobile, the keys were given to him by the defendant, and some money.

The defendant admitted she loaned him some money so he and Miss Willits, and a girl he was dating at the time, can make their escape or at least leave the Orlando area, and that he did.

We found him in Pennsylvania, flew him back, and [11] brought him back for the hearing and for this trial.

Think about Mr. McCraney on the stand. Mr. Kirkland confused him and, to some degree, may have impeached him, but the basic story he told was the first story he told Officer Aiello that night, and I submit to you that it's the truth.

After calling Officer Aiello, Officer Aiello also testified as to the condition of David McGough that night, that there was no scratch on his chest, that he looked at him very closely because he heard about the knife, and he took into evidence that shirt of the defendant, the shirt which will have some, as we discussed before, but you will be able to see, you can take this back yourselves. You can see the cuts on that shirt. This is what he took into evidence.

I called Judy Willits next and Miss Willits testified she was at that time a topless dancer, and she saw no fight, or, excuse me, she saw the start of the fight, but she never saw the victim, Philip Gauthier, with a knife in his hand. She told the police that. She told Mr. Kirkland that under oath. She came into my office and, for about an hour, told me that. I advised her of perjury. I advised her that, if she did not tell the truth, because I had David Gauthier's statement at that time, which I believed to be the truth, but I would [12] prosecute her for perjury.

MR. KIRKLAND: Your Honor, I object to both of those comments and I don't believe I have ever done this before, but he is commenting now about some statement that's not even in evidence. That's highly prejudicial in closing argument.

THE COURT: Sustain the objection.

MR. BAND: Okay.

THE COURT: Would you approach the bench, please?

(Whereupon, a side bar conference was had between the counsel and the Court outside the hearing of the jury and on the record as follows:)

THE COURT: What you have been doing is just testifying to the jury.

MR. BAND: Excuse me.

MR. KIRKLAND: I'm going to move for a mistrial after it's over and on two statements already.

THE COURT: You have been testifying about what you did.

MR. BAND: Well, the, I took his, I took the statements and the jury is aware I took statements.

THE COURT: I understand, but you are testifying about what you did. You are testifying about what your practice is, about prosecuting for perjury.

MR. KIRKLAND: I was going to move for a mistrial.

* * *

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 1981

LINDA L. McGOUCH,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

CASE No. 80-561

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Opinion filed November 11, 1981

Appeal from the Circuit Court
for Orange County,
Richard B. Keating, Judge.

Edward R. Kirkland, P.A.,
Orlando, for Appellant.

Jim Smith, Attorney General,
Tallahassee, and Mark C. Menser,
Assistant Attorney General,
Daytona Beach, for Appellee.

DAUKSCH, CJ.,

This is an appeal from a conviction of murder in the second degree.

The appellant was charged with murder in the first degree and went to trial on that charge. At trial she requested an instruction be given the jury relating to the penalty she could receive if convicted. Thr trial judge refused to give the penalty instruction. *Tascano v. State*, 393 So.2d 540 (Fla. 1930), *rehearing denied*, Feb. 27,

1981, requires the giving of such an instruction in compliance with Florida Rule of Criminal Procedure 3.390(a):

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) *for the offense* for *which the accused is then on trial.* (emphasis added).

Although our Supreme Court has said a *Tascano* violation is reversible error we do not believe *Tascano* applies here. There is no requirement in the law that a trial judge instruct the jury as to the penalty for a lesser included offense.

The failure to give an instruction regarding the penalty for a crime of which the accused was not convicted must be harmless error. *See James v. State*, 393 So.2d 1138 (Fla. 3d DCA 1981).

AFFIRMED.

COBB and UPCHURCH, F., JJ., concur.